UNITED OVERSEAS BANK (MALAYSIA) BHD

v.

LOKE LAI YING

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: B-03-22-1999]
10 JUNE 2003

BANKRUPTCY: *Notice - Application to set aside - Setting aside bankruptcy notice by way of affidavit under r. 95(1) Bankruptcy Rules - Affidavit not in compliance with Form 7 and r. 94(1)(b) - Whether curable under court's inherent power to do "complete justice"- Whether bad in law - Whether could not operate as application to set aside bankruptcy notice - Bankruptcy Act 1967, s. 91(1) - Bankruptcy Rules 1969, rr. 94(1)(b), 95(1)*

WORDS & PHRASES: *"Doing complete justice" - Section 91(1) Bankruptcy Act 1967 - Meaning of phrase*

In 1991, Lee Wah Bank Limited ('Lee Wah') had obtained a final judgment against the respondent for sums of monies amounting to RM152,246.69 and RM460,496.39 respectively. By a vesting order dated 12 July 1994, the assets, rights and liabilities of Lee Wah came to be assumed by the appellants, following which the appellants took out a bankruptcy notice against the respondent demanding payment of the sums due. This bankruptcy notice was however never served and was allowed to lapse, as the amount claimed therein was found to be incorrect. Be that as it may, on 15 April 1996, the appellants filed another bankruptcy notice claiming for RM194,245.81 and had the same duly served on the respondent. The respondent responded by filing an affidavit praying to set aside the bankruptcy notice, wherefore the learned registrar, treating the affidavit as an application to set aside a bankruptcy notice pursuant to r. 95(1) of the Bankruptcy Rules 1969 ('the Rules'), allowed the prayer and set aside the bankruptcy notice. The appellants appealed to the judge in chambers, and, being unsuccessful thereat, appealed further.

Before the learned appellate judges, the appellants argued that the respondent's affidavit had not complied with Form 7 of the Appendix to the Rules, and had further contravened r. 94(1)(b) by not raising the contention that the respondent had a counterclaim, set off or cross demand that equaled or exceeded the amount of the judgment debt, such that it was bad in law and could not operate as an application to set aside a bankruptcy notice under r. 95(1) of the Rules. It was further contended that, upon the obtaining facts, the respondent properly ought to have proceeded under r. 18 of the Rules, by filing a summons in chambers supported by affidavit. The respondent admitted to the procedural errors thus pointed out, but urged the court nonetheless to overlook same by exercising the court's inherent power to do "complete justice" under s. 91(1) of the Bankruptcy Act 1967 ('the Act').

Held:

Per Abdul Aziz Mohamad JCA

[1] Section 91(1) of the Act gives full power to the court to decide all questions for the purpose of doing complete justice in bankruptcy cases. The emphasis of the section is on deciding all questions, whether of fact or law. It is however not the intention of the section that if the answer to a question is found to be in favour of the creditor, the debtor is yet to be saved on the perception that that would be doing complete justice. Complete justice is owed to both parties equally. (p 151 d-e)

[2] In this case, since the question of law whether the mode adopted by the respondent to apply for the striking out of the bankruptcy notice was clearly to be decided in favour of the appellants, the consequence of the decision must be given effect to. It is not the intention of s. 91(1) to give power to the court to decide further, in the name of doing complete justice, to overlook the fault or validate it. (p 151 f)

Obiter:

[1] Even if the respondent had applied under r. 18 for the striking out of the bankruptcy notice and the affidavit of the respondent had been one in support of the application, we would still have allowed the appeal all the same. Clearly, since the first bankruptcy notice had lapsed, there was no question of the case in which it had been filed proceeding further, even if the bankruptcy notice was not formally withdrawn. The bankruptcy notice had also alluded to the proper effects of the vesting

order and to the fact that the amount claimed was the amount due on the final judgment in question, and that being so, the respondent could not have been misled, embarrassed or perplexed just because she did not have sight of the vesting order. Likewise, the 3-sen discrepancy was only a misprint that did not affect the calculation. This being the case, the grounds upon which the learned set aside the bankruptcy notice, being the failure to withdraw the earlier bankruptcy notice, the failure to serve the vesting order and the existence of a 3-sen discrepancy between the judgment sum and the sum stated as the judgment sum in the bankruptcy notice, were clearly invalid and not sound. (pp 152 a-g & 154 f)

[Appeal allowed; respondent to comply with bankruptcy notice within seven days to avoid committing act of bankruptcy.]

*[**Bahasa Malaysia** Translation of Headnotes*

Pada tahun 1991, Lee Wah Bank Ltd ('Lee Wah') memperoleh penghakiman muktamad terhadap responden bagi jumlah RM152,246.69 dan RM 460,496.39 masing-masingnya. Melalui satu perintah letakhak bertarikh 12 Julai 1994, segala aset, hak dan tanggungan Lee Wah telah diambilalih oleh perayu, dan berikutnya, perayu memfail notis kebankrapan terhadap responden menuntut bayaran hutang tersebut. Notis kebankrapan ini, bagaimanapun, tidak diserahkan dan dibiarkan luput atas alasan terdapat kesilapan pada pengiraan tuntutan. Walaupun begitu, pada 15 April 1996, perayu memfail notis kebankrapan baru menuntut sebanyak RM194,245.81 dan kemudian membuat serahan yang teratur ke atas responden. Responden membalas dengan memfail afidavit memohon supaya notis kebankrapan diketepikan, dan berikutnya, pendaftar yang bijaksana, dengan menganggap afidavit tersebut sebagai suatu permohonan untuk mengetepikan notis kebankrapan di bawah per. 95(1) Peraturan-peraturan Kebankrapan 1969 ('Peraturan'), membenarkan permohonan dan seterusnya mengetepikan notis kebankrapan. Perayu merayu kepada hakim dalam kamar dan, apabila gagal di situ, merayu lagi.

Di hadapan hakim-hakim rayuan yang bijaksana, perayu berhujah bahawa afidavit responden tidak mematuhi Borang 7 seperti di Apendix Peraturan, serta gagal mematuhi per. 94(1)(b) kerana tidak menyatakan bahawa responden mempunyai suatu tuntutan balas, set-off ataupun tuntutan bersilang yang menyamai atau melebihi jumlah terhutang, dan dengan yang demikian, ianya adalah tidak sah di sisi undang-undang dan tidak boleh beroperasi sebagai suatu permohonan untuk mengetepikan notis kebankrapan

di bawah per. 95(1) Peraturan. Dihujahkan selanjutnya bahawa, berdasarkan fakta kes, responden sepatutnya memulai di bawah per. 18 Peraturan, dengan memfail saman dalam kamar yang disokong oleh afidavit. Responden mengakui akan kesilapan-kesilapan prosedur seperti yang ditunjuk, tetapi meminta mahkamah supaya tidak menghiraukan kesilapan-kesilapan tersebut melalui kuasa sedia ada mahkamah untuk memberikan "keadilan penuh" di bawah s. 91(1) Akta Kebankrapan 1967 ('Akta').

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Seksyen 91(1) Akta memberi kuasa penuh kepada mahkamah untuk memutuskan semua persoalan bagi tujuan memberikan keadilan yang penuh dalam kes-kes kebankrapan. Tekanan seksyen ini adalah kepada memutuskan semua persoalan, samada persoalan fakta atau undang-undang. Bagaimanapun, ianya bukanlah tujuan seksyen ini untuk menyatakan bahawa, sekiranya jawapan kepada sesuatu soalan itu memihak kepada pemiutang, maka penghutang masih perlu diselamatkan atas pandangan bahawa itu akan memberi keadilan yang penuh. Keadilan penuh adalah ditujukan kepada kedua-kedua pemiutang dan penghutang.

[2] Dalam kes semasa, oleh kerana persoalan undang-undang sama ada kaedah yang digunakan oleh responden untuk memohon untuk mengetepikan notis kebankrapan di sini harus dengan jelas dijawab secara yang memihak kepada perayu, maka akibat dari keputusan tersebut perlu diberikan kesannya. Bukanlah menjadi tujuan s. 91(1) untuk memberi kuasa kepada mahkamah untuk memutuskan selanjutnya, atas nama memberikan keadilan penuh, dengan tidak menghiraukan kesilapan sedemikian atau mengesahkannya.

Obiter:

[1] Jikapun responden memohon di bawah per. 18 bagi mengetepikan notis kebankrapan dan afidavit responden di sini menjadi afidavit menyokong permohonan, kami akan tetap membenarkan rayuan ini. Adalah jelas bahawa, oleh kerana notis kebankrapan pertama sudahpun luput, maka tidak timbul lagi soalan sama ada kes di mana ianya difail akan diteruskan, walaupun notis kebankrapan tersebut tidak ditarik balik secara rasmi. Notis kebankrapan juga ada menyentuh tentang kesan-kesan penuh perintah letakhak serta fakta bahawa jumlah yang dituntut adalah jumlah yang terhutang di bawah penghakiman muktamad yang berkaitan, dan oleh hal yang demikian, tiada sebab mengapa responden

harus merasa terkeliru atau teraniaya hanya kerana perintah letakhak tersebut tidak diserahkan kepadanya. Begitu juga, perselisihan 3 sen yang berkaitan hanyalah satu kesilapan cetak yang sekali-kali tidak menjejaskan pengiraan. Oleh hal yang demikian, alasan-alasan yang digunakan oleh hakim yang bijaksana bagi mengetepikan notis kebankrapan, yakni kerana kegagalan untuk menarik balik notis kebankrapan yang terdahulu, kerana kegagalan untuk menyerahkan perintah letakhak dan kerana terdapat perbezaan 3 sen di antara jumlah penghakiman dan jumlah yang dicatitkan sebagai jumlah penghakiman di dalam notis kebankrapan, adalah tidak menyakinkan dan tidak sah.

Rayuan dibenarkan; responden harus mematuhi notis kebankrapan dalam masa tujuh hari bagi mengelak melakukan perbuatan kebankrapan.]

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***

Development and Commercial Bank Ltd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(refd)***

Lesco Development Corporation Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***

Lim Kim Guan & Ng Sew Eng v. Four Seas Communications Bank Limited [1990] 1 CLJ 372; [1990] 3 CLJ (Rep) 757 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 91(1), 131
Banking and Financial Institutions Act 1989, s. 50(1)
Banking Rules 1969, rr. 18, 94(1)(b), 95(1), (2), 96

For the appellants - P Royan (T Sudharsanan); M/s Shook Lin & Bok
For the respondents - Paul Kwong (Wong Hin Loong); M/s Azman, Davidson & Co

[Appeal from High Court, Shah Alam; Bankruptcy No: 29-1013-1996]

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad JCA:

We had before us on 15 July 2002 two appeals from the High Court in Shah Alam, brought by the appellants, United Overseas Bank (Malaysia) Berhad, who had had bankruptcy notices issued against the respective respondents. The appeals arose out of the setting aside of the bankruptcy notices by the deputy registrar on the separate applications of the respondents, which were heard together by the deputy registrar, and the subsequent dismissal of the appellants' appeals to the judge in chambers,

which came up before different judges. In the High Court, the parties in one of those appeals, that is the parties in appeal No. B-03-27-1999 before us, where the respondent was Khoo Hock Chum, had agreed to be bound by the decision in the other appeal, which resulted in appeal No. B-03-22-1999 before us, where the respondent was Loke Lai Ying. The two appeals before us were therefore conducted on the basis that submission would only be made on appeal No. 22 and that the decision in that appeal would apply to appeal No. 27. The facts and considerations that follow are therefore those in or for appeal No. 22.

The facts were these. On 9 January 1991 Lee Wah Bank Limited obtained a single judgment against the respondent Loke Lai Ying (and also against Khoo Hock Chum the respondent in appeal No. 27) for two sums, RM152,246.69 and RM460,496.39, with interest and costs. On 12 July 1994, by a vesting order under s. 50(1) of the Banking and Financial Institutions Act 1989, the assets, rights and remedies of Lee Wah Bank Limited vested in United Overseas Bank (Malaysia) Berhad, the appellants.

On 30 September 1995 the appellants, in Bankruptcy No. 29-2618-1995, had a bankruptcy notice issued against the respondent demanding payment of the amount due on the judgment of 9 January 1991, which they were entitled to claim by virtue of the vesting order. The bankruptcy notice, however, was never served on the respondent because the appellants realized that the computation in the notice was not in accordance with the judgment. The notice lapsed three months later, on 30 December 1995, because according to r. 96 of the Bankruptcy Rules 1969 it had to be, but was not, served within the three months. But on 15 April 1996, in Bankruptcy No. 29-1013-1996, the appellants filed another bankruptcy notice claiming the sum of RM194,245.81 as being due on the judgment obtained by Lee Wah Bank Limited on 9 January 1991. The judgment notice stated the fact that all assets, rights and remedies of Lee Wah Bank Limited had vested in the appellants by virtue of the vesting order of 12 July 1994. The bankruptcy notice was served on the respondent on 11 July 1996 but a copy of the vesting order was not served with it. The respondent responded by filing an affidavit dated 18 July 1996 in which she prayed that the bankruptcy notice be set aside. The deputy registrar, by virtue of r. 95(1) of the Bankruptcy Rules 1969, treated the affidavit as operating as an application to set aside the bankruptcy notice, heard the application, and set aside the bankruptcy notice.

The appellants' main ground of appeal in their appeal to this court, as also in their appeal to the judge in chambers, was that the respondent's application for the setting aside of the bankruptcy notice, made as it was through the vehicle of that affidavit, was invalid as the form and manner of it was not permitted by the rules. For an affidavit to operate by virtue of r. 95(1) as an application to set aside a bankruptcy notice, it must be an affidavit that is mentioned in r. 94(1)(b), that is to say, an affidavit to the effect that the judgment debtor has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained, and the affidavit must be in Form 7 in the Appendix to the Rules, which Form bears the heading "AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE". But the respondent's affidavit was not, in content, such an affidavit and did not bear such a heading, the heading being just "AFFIDAVIT". In content, it raised various grounds for setting aside the bankruptcy notice but not the ground that she had such a counterclaim, set off or cross demand. According to the Supreme Court in *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324, challenges to a bankruptcy notice on grounds other than that the debtor has such a counterclaim, set off or cross demand must be made under r. 18 by filing a notice of motion – now a summons in chambers – supported by an affidavit, and not by simply filing, without an application, an affidavit, which in that case was an "affidavit in opposition", which was consequently held to be ineffective and bad in law. Accordingly, it was submitted before us that the respondent's affidavit was bad in law and could not operate as an application to set aside the bankruptcy notice.

The respondent's counsel conceded that on the authorities the appellants were correct in their objection to the form and manner of the respondent's application, but he urged us to overlook the procedural error by invoking what he conceived to be the inherent powers of the court under s. 91(1) of the Bankruptcy Act 1967. Quoting only the limb relied on by counsel, the section provides as follows:

> Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide ... all ... questions whatsoever, whether of law or fact, ... which the court deems it expedient or necessary to decide for the purpose of doing complete justice ... in any (case of bankruptcy).

Clutching at the words "doing complete justice", counsel submitted, as if this was a matter of exercise of discretion in the granting of an interlocutory injunction or a stay of execution pending appeal, that the balance of convenience lay in favour of exercising the perceived discretion in the section, in that if the respondent was procedurally disqualified from challenging the bankruptcy notice, she would face dire consequences, whereas if she was not and she succeeded in setting aside the bankruptcy notice, as she did in the High Court, the appellants could always file another bankruptcy notice. To exercise the discretion in the respondent's favour would therefore, so we understood counsel to intend to say, be "doing complete justice".

Section 91(1), as far as the limb that we have quoted is concerned, gives full power to the court to decide all questions for the purpose of doing complete justice in bankruptcy cases. The emphasis of the section is on deciding all questions, whether of fact or of law. It tells the judge that to do complete justice he has full power to decide all questions and he should exercise the power if necessary. Do not leave any question undecided, if by not deciding it complete justice will not be done. Do not leave any stone unturned in the pursuit of complete justice. But it is not the intention of the section that if the answer to a question is found to be in favour of the creditor, the debtor is yet to be saved on the perception that that would be doing complete justice. Complete justice is owed to both parties equally, not to one only. If in the interest of doing complete justice a question is decided, and decided in favour of a party, the consequence of the decision ought to be given effect to. Thus, in this case, since the question of law whether the mode adopted by the respondent to apply for the striking out of the bankruptcy notice was clearly to be decided in favour of the appellants, the consequence of the decision must be given effect to. It is not the intention of s. 91(1) to give power to the court to decide further, in the name of doing complete justice, to overlook the fault or to validate it. The discretion to do that is given by s. 131 and r. 274, which counsel refrained from resorting to, probably because the Federal Court had held in *Development and Commercial Bank Ltd v. Datuk Ong Kian Seng* [1995] 3 CLJ 307, that such a defect as occurred in this case was not a formal defect or irregularity that could be cured even by resort to that section or that rule.

As the appellants succeeded on their main ground of appeal, we allowed the appeal.

Even if the respondent had applied under r. 18 for the striking out of the bankruptcy notice and the affidavit of the respondent had been one in support of the application, we would have allowed the appeal all the same, because we were of the view that the grounds on which the learned judge found that the bankruptcy notice was invalid were not sound. There were three grounds and they concerned points that were among the points that the respondent had raised in her affidavit.

The first ground was that the appellants had not withdrawn the earlier bankruptcy notice of 30 September 1995. For that reason the judge ruled that the subsequent bankruptcy notice dated 15 April 1996 should be set aside. In so ruling, he relied on the following view of the Supreme Court in *Lesco Development Corporation Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; ([1987] CLJ (Rep) 160) at p. 291 (p. 161):

> It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter.

That was said in the context of a situation where two actions had been simultaneously maintained to recover a debt secured by a charge of land, that is to say, a foreclosure action and an action for debt. The situation in the present case was of a completely different character. Furthermore, there was no question in this case of two different courts trying and determining the same issues between the same parties relating to the same subject matter. Since the first bankruptcy notice had lapsed, there was no question of the case in which it had been filed proceeding further, even if the bankruptcy notice was not formally withdrawn. Since the first notice had not been served and had lapsed, the appellants were perfectly entitled to issue the subsequent notice.

The second ground was the appellants' failure to serve on the respondent a copy of the vesting order together with the bankruptcy notice. This was what the judge said at p. 11 of his grounds of judgment:

> I am of the opinion that the bankruptcy notice was misleading, embarrassing or perplexing. Without making further enquiries, the Respondent could not be certain that he would be making payment to the correct party. In light of this, the Respondent had not failed to comply with the bankruptcy notice.

As stated earlier, the bankruptcy notice did state the fact that all assets, rights and remedies of Lee Wah Bank Limited had vested in the appellants by the vesting order of 12 July 1994. The bankruptcy notice also stated the fact that the amount claimed was the amount due on the final judgment which Lee Wah Bank Limited had obtained against the respondent.

In opining that in the absence of a copy of the vesting order the bankruptcy notice was misleading, embarrassing or perplexing, the learned judge was inspired by a passage in the judgment of Thean J in the Singapore case of *Lim Kim Guan & Ng Sew Eng v. Four Seas Communications Bank Limited* [1990] 1 CLJ 372; ([1990] 3 CLJ 757), at p. 377 (p. 763):

> All these cases show how strictly the courts have construed and treated a bankruptcy notice because of the serious consequences – the courts have called them 'penal consequences' or 'quasi-penal consequences' – which ensue upon a debtor's non-compliance with the notice. A bankruptcy notice must not be calculated to mislead, embarrass or perplex the debtor. In this connection, the test is not whether the debtor has been misled, embarrassed or perplexed by the bankruptcy notice, but whether he could be so misled, embarrassed or perplexed.

The cases referred to in the passage which led Thean J to arrive at the conclusion set out in the passage were cases on whether the bankruptcy notice in question required the debtor to pay the judgment debt "in accordance with the terms of the judgment or order", a requirement that is also to be found in s. 3(1)(i) of our Bankruptcy Act 1967, where the court found that the particular respect in which the requirement to pay was not in accordance with the judgment was likely to mislead, embarrass or perplex the debtor. The requirement in the judgment notice in this case that the respondent make payment to the appellants was of course not in accordance with the judgment but it was in law an inevitable requirement in view of the vesting order. The reason for the requirement having been manifested in the notice itself, we were unable to see how the respondent could or might have been misled, embarrassed or perplexed by the requirement. The position was so clearly set out in the bankruptcy notice that the requirement could not have misled, embarrassed or perplexed her and we were unable to agree with the learned judge that the respondent could have been misled, embarrassed or perplexed just because she did not have sight of the vesting order.

The third ground was a trivial one that nevertheless requires some effort in setting out the circumstances. The bankruptcy notice had appended to it particulars showing how the sum of RM194,245.81 that was demanded had been arrived at. As earlier stated, the judgment was for two sums, RM152.246.69 and RM460,496.39, with interest and costs. The particulars were in two parts, Part A being for the first sum, which was under a fixed loan, and Part B being for the second sum, which was under an overdraft. Each part began by stating the judgment sum and then proceeded to add interest raised on it and on the resultant sum from time to time and to subtract payments made from time to time, and ended with the resultant amount owing as at 15 April 1996, the date of the bankruptcy notice. The amount for Part was RM149,274.46 and that for Part B was RM44.971.35. The two amounts totalled RM194,245.81, the amount demanded by the bankruptcy notice.

At the beginning of Part B, however, the setting out of the judgment sum and of the first raising of interest appeared as follows:

1. Judgment sum	RM460,496.36
2. Add: Overdue Interest at 12% per annum on RM460,496.39 from 1-1-1991 to 31-1-1991	RM 4,693.27
	RM465,189.66.

It can be seen that although the judgment sum was incorrectly stated to be RM460,496.36, which was 3 sen less than the correct amount, the correct amount was used in calculating the first interest, and the total of RM465,189.66 was arrived at as if the judgment sum, although incorrectly stated, had included 3 sen more. It was clear to me, therefore, that the sum of RM460,496.36 was a misprint which did not affect the calculation. Yet the learned judge, at p. 13 of his grounds of judgment, said this:

> Therefore in the instant case there was a discrepancy in the Bankruptcy Notice which indicated that the wrong amount had been claimed. Accordingly, the bankruptcy notice was therefore invalid.

We need say nothing more about it.

As the respondent's affidavit had been treated by virtue of r. 95(1) as an application to set aside the bankruptcy notice, and as, therefore, by virtue of r. 95(2) no act of bankruptcy had been committed by the respondent by her failure to satisfy the bankruptcy notice, in allowing the appellants' appeal we allowed the respondent seven days to satisfy the bankruptcy notice to avoid committing an act of bankruptcy. In view of the basis on which the two appeals were conducted, as explained earlier, our decision applied also to the other appeal.